IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Custody of:	)	**No. 28744-1-III**
	)	
COURTNEY P. BLEVINS.	)	**Division Three**
	)	
	)	**UNPUBLISHED OPINION**
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Kulik, C.J. — Arda Blevins appeals the court's contempt judgment and order, as well as its entry of a temporary residential schedule, on the ground that the commissioner should have recused himself because he had represented the child's father in previous hearings. We conclude that while the error was unintentional and inadvertent, we remand this matter for rehearing.

FACTS

Arda,[1] the grandmother of the child in this matter was awarded full custody of the child in 2002. On August 23, 2004, the court entered a custody decree modifying the visitation rights of the mother, Billie Blevins, and the father, Tim Jenkins. The father was

[1] We use first names for clarity.

represented by M. Scott Wolfram, who signed the custody decree as the attorney for Mr. Jenkins. The custody decree provided that the child's parents would each receive one-quarter of the summer visitation, while Arda would receive the remaining one-half. In a letter sent to Arda on July 21, 2009, Billie requested two weeks' visitation before the end of the summer of that year. Arda provided Billie two days' visitation.

On December 1, 2009, Billie filed a motion for an order holding Arda in contempt and for an order providing Billie with make-up visitation. Commissioner M. Scott Wolfram heard and decided the case. Neither party filed a motion or affidavit of prejudice. Furthermore, neither party otherwise objected during the proceeding to Commissioner Wolfram hearing or deciding the case. On December 18, 2009, Commissioner Wolfram found Arda in contempt of the 2004 agreed modified custody decree, awarded Billie two weeks' visitation during the winter holiday season, and required Arda to pay a $100 sanction and a $750 attorney fee.

Arda appeals, asserting that Commissioner Wolfram should not have ruled on the contempt motion because of his prior representation of the father.

ANALYSIS

CJC 3(D)(1)provides that

> [j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:

. . . .

(b) the judge previously served as a lawyer . . . in the matter in controversy.

"Generally, disqualification is required when a judge has participated as a lawyer in the case being adjudicated." *State v. Dominguez*, 81 Wn. App. 325, 329, 914 P.2d 141 (1996); *see also People v. Vasquez*, 307 Ill. App. 3d 670, 718 N.E.2d 356 (1999); *Sharp v. Howard County*, 327 Md. 17, 607 A.2d 545 (1992). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995) (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

The Supreme Court has declared its concern for protecting the integrity of the judiciary, stating that "where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." *Id.* at 205.

Here, Arda did not raise the issue of the commissioner's prior representation in the superior court action and, apparently, no one, including Commissioner Wolfram, recognized that he had been involved in the case as a lawyer in 2004.

The fact that the issue was never raised at all, is telling: if the parties themselves

did not immediately recognize the conflict of interest, it seems unlikely that the commissioner, with an undoubtedly busy docket, would have recognized it. There was nothing to immediately alert Commissioner Wolfram of the conflict of interest because Mr. Jenkins, the party who he had represented almost six years earlier, did not appear in the courtroom on the day of the contempt proceeding between Arda and Billie. Additionally, it is quite likely that Commissioner Wolfram never noticed his own signature on the 2004 agreed modified custody decree. His signature appears only on the last page of the decree, set apart from the signatures of the other parties and separated by four pages from the provision at issue in the contempt proceeding.

Without knowledge that he had served as a lawyer in the matter in controversy, the commissioner likely operated on this case with the same level of impartiality that he displays in his other cases. Even so, legitimate policy concerns of maintaining public confidence in the judiciary require remand of the case to a different judge. *See Sherman*, 128 Wn.2d at 205. Thus, we conclude that while the error was unintentional and inadvertent, the matter should be reheard.

Billie asks for attorney fees for a frivolous appeal. Whether an appeal is frivolous is determined by the following considerations:

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that

> is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Streater v. White, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). Arda's appeal is not frivolous and, therefore, we deny Billie's motion for attorney fees.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Sweeney, J.

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Siddoway, J.